Trans Resources Corp Sdn Bhd v Inai Kiara Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–131 OF 2010
LIM CHONG FONG JC
9 JULY 2014

Tort — Negligence — Duty of care — River traffic — Vessel collision incident — First defendant used river to transport its material and equipment for its construction project in upstream — Aware of plaintiff's construction site and activities and sought permission to sail its dredger through site — Permission granted subject to certain safety and precautionary measures be taken — Pilot ignored plaintiff's flagman's instruction to stop and squeezed through narrow river channel — Whether there was negligence — Whether duty of care owed

This was a tort of negligence action arising from a vessel collision incident onto constructed bridge pier spun piles for a river bridge crossing. The plaintiff was the contractor who was awarded the construction contract by the Public Works Department of Sarawak to build the proposed road between Sibu and Sungei Loba Satubah in Sarawak ('the project'). The first defendant was the registered owner of the tugboat named as the Inai Teratai 86 ('IT'). The second defendant was the registered owner of the barge named as Eng Tou110 ('ET'). The third defendant was at the material time an employee of the first defendant and the captain piloting the IT. The third party chartered the ET from the second defendant via a rental agreement and the first defendant sub-chartered the ET from the third party. The claim in this action was a subrogated claim of RM1,173,059.41 made in the name of the plaintiff by Overseas Assurance Corp (M) Bhd ('OAC') for recovery after payout to the plaintiff under the contractor all risk insurance policy. The project involved the construction of the river bridge crossing at Sungei Loba Satubah. The bridge was supported by piers on both sides of the river bank. The foundation for the piers comprised of driven pre-stressed concrete spun piles. The piles were driven by a piling rig placed on a barge towed by a tug boat. The villagers living upstream commute using the river daily. The first defendant also used the river to transport its material and equipment for its construction project in the upstream vicinity. The first defendant was aware of the plaintiff's construction site and activities and sought permission from the plaintiff to sail its dredger through the site. The plaintiff permitted the first defendant to do so subject to certain safety and precautionary measures be taken. The Sarawak River Board did not allow the river to be closed to traffic in the course of construction of the bridge and the plaintiff was required to deploy navigational buoys, stationery warning flags and flagmen. In this respect, navigational buoys were placed at distances of 500 metres and a red flag was fixed on the piling rig barge used for piling of the spun piles. The piling barge was berthed near the piled spun piles. There were no

flags or other warning signs placed on the piles. The IT sailed on the river towing the ET. The pilot of the IT ignored the plaintiff's flagman's instruction to stop and squeezed through the narrow river channel. This resulted in the first incident of collision — the ET collided onto the plaintiff's barge Melana 23. The plaintiff had completed piling the spun piles for the piers on both sides of the river bank. The piling rig barge and tugboat were nevertheless still at the site berthed on the river. Early that morning, the IT again sailed on the river towing the ET and the second incident of collision occurred — one of the vessels collided onto the plaintiff's completed piles. This second incident formed the substratum of this action. The plaintiff contends that the incident was caused by the defendants' negligence, particularly that the ET was towed by the IT at an excessive speed and without heeding the warning signs. It was unsafe navigation by the defendants in ignorance of safety warnings and signals. In crux, it was the plaintiff's case that the IT piloted by the third defendant that was towing ET sailed at an alarming speed along the river waterway in the upstream direction at around 0700 hours. The third defendant did not heed the signal of the plaintiff's flagman Sonny Ajang to stop or slow down the vessels. Consequently the ET collided and damaged three spun piles of Pier 3 of the bridge. In this regard, the plaintiff primarily relied on the translated written statement of Sonny Ajang made to the loss adjustor after the incident. The plaintiff further emphasised that this version must be accepted since judgment has been entered against the third defendant who proffered a conflicting version of the incident that was relied upon by the first defendant.

Held, allowing the claim in part:

(1) Although the first defendant had contended that no duty of care was owed, no cogent case authority was produced by the first defendant to support its proposition. The argument of the first defendant was that as an ordinary user of the river for navigation, it owed a duty of care only to other users of the river as navigational channel. The first defendant did not however owe the duty to the plaintiff who caused obstruction and danger to the river traffic. The plaintiff was lawfully present at the river site to undertake construction works. The completed piling work of the plaintiff could be considered an obstruction because it was necessitated and formed part and parcel of the construction works. The parties were sharing usage of the river waterway. The Sarawak River Board did not permit the plaintiff to close the river and the plaintiff must not obstruct or endanger riverine traffic. The plaintiff had deployed navigational buoys but was not required to place lights, signs or warnings on the completed piles pursuant to the Sarawak Rivers (Traffic) Regulations 1993 (see paras 32–33).

(2) The incident in this case was no different from a road motor vehicle collision onto an overhead bridge support structure under construction. The first and third defendants owed the duty of care to the plaintiff. The

principal issue for determination is whether there was breach of that duty of care that in consequence damaged the piles as alleged. This was essentially a factual issue which is much dependent on the evidence as adduced by the parties. The principle of *res ipsa loquitor* is inapplicable here because the plaintiff knew and adduced evidence as to why and how the incident occurred (see paras 34–35).

(3) The plaintiff's case based on Sonny Ajang's written statement was simply the IT that was towing ET sailed very fast towards the plaintiff's construction site. The third defendant, the skipper and pilot of the IT did not heed the signal of the plaintiff's flagman to stop or slow down the vessels and that resulted in the ET colliding onto the piles. This factual version was in direct conflict with the first defendant's version based on the third defendant's written statement that the IT towed the ET sailed slowly against receding river current because the pilot was well aware of the existence of the plaintiff's construction site. At the material time of the incident, the third defendant stopped the engine of the IT upon seeing the red flag placed on the piling rig barge to avoid colliding with the barge and the constructed spun piles. The only common fact was that the collision onto the plaintiff's completed piles nonetheless happened. The true account of the incident is only within the personal knowledge of Sonny Ajang and the third defendant. Neither of them was called as a witness to testify in court and be cross-examined on the incident. The parties only relied on their respective out of court statement made after the incident and the testimony of other witnesses who have secondhand hearsay knowledge from either of them (see paras 36–38).

(4) There was no finding of fault or summons issued by the Sarawak River Board on the incident which would be helpful to ascertain culpability for the incident. However, the finding or summon of the Sarawak River Board is neither critical nor necessary for the plaintiff to prove its case. The third defendant breached his duty of care when he knowingly sailed the vessels too close to the piles. The damage consequential to the breach is the collision that damaged the plaintiff's completed piles. In other words, the third defendant was negligent. The first defendant as the employer of the third defendant was vicariously liable for the breach of tortious duty committed by its employee under a contract of service in the course of employment (see paras 41, 44–45).

(5) The first defendant was negligent for not ensuring that the vessels did not sail too closely to the piles. The second defendant who had no direct legal relationship with the first defendant, the issue of culpability is a question of law. The resultant damage was not reasonably foreseeable by the second defendant. Besides, there was the absence of direct proximity between the plaintiff and the second defendant. It would also be unjust and unreasonable to impose liability on the second defendant since it had

no control and management of the vessels at the material time of the collision. There was therefore no duty of care owed by the second defendant to the plaintiff here. Accordingly, the plaintiff's submission that the ET and IT constituted a 'one boat' or 'one vehicle' making the second defendant a joint tortfeasor with the first defendant was misconceived (see paras 47 & 50).

[Bahasa Malaysia summary

Ini adalah tindakan tort untuk kecuaian yang timbul daripada kejadian pelanggaran kapal dengan cerucuk putaran tembok jambatan yang sedang dibina untuk laluan jambatan sungai. Plaintif adalah kontraktor yang telah diawardkan kontrak pembinaan oleh Jabatan Kerja Awam Sarawak untuk membina cadangan jalan di antara Sibu dan Sungei Loba Satubah di Sarawak ('projek itu'). Defendan pertama adalah pemilik berdaftar bot tarik bernama Inai Teratai 86 ('IT'). Defendan kedua adalah pemilik berdaftar baj bernama Eng Tou 110 ('ET'). Defendan ketiga pada masa matan adalah pekerja defendan pertama dan kapten yang mengemudi IT. Pihak ketiga telah mencarter ET daripada defendan kedua melalui perjanjian sewa dan defendan pertama telah ET itu daripada pihak ketiga. Tuntutan dalam tindakan ini adalah tuntutan subrograsi berjumlah RM1,173,059.41 yang dibuat atas nama plaintif oleh Overseas Assurance Corp (M) Bhd ('OAC') untuk mendapatkan semula bayaran selepas banyak keluar kepada plaintif di bawah polisi insurans semua risiko kontraktor. Projek itu melibatkan pembinaan laluan jambatan sungai di Sungei Loba Satubah. Jambatan itu disokong oleh tembok di kedua-dua belah tebing sungai. Asas untuk tembok itu terdiri daripada cerucuk putaran konkrit pra-tekanan. Cerucuk-cerucuk itu telah dibawa dengan rig cerucuk yang diletakkan atas baj yang ditarik oleh bot tarik. Penduduk kampung yang tinggal di hilir sungai menggunakan laluan sungai setiap hari. Defendan pertama juga menggunakan sungai itu untuk membawa bahan dan peralatannya untuk projek pembinaannya ke kawasan hilir sungai. Defendan pertama mengetahui tentang kawasan dan aktiviti pembinaan plaintif dan meminta kebenaran daripada plaintif untuk mengemudi kapal koreknya melalui kawasan itu. Plaintif membenarkan defendan pertama untuk berbuat demikian dengan syarat keselamatan tertentu dan langkah-langkah berjaga-jaga diambil. Lembaga Sungai Sarawak tidak membenarkan sungai itu ditutup kepada laluan trafik sepanjang pembinaan jambatan itu dan plaintif dikehendaki mengatur kedudukan boya pandu arah, bendera amaran tetap, dan pemandu bendera. Sehubungan itu, boya pandu arah itu diletakkan dengan langkauan jarak 500 meter dan bendera merah diletakkan pada baj rig cerucuk yang digunakan untuk kerja memantakkan tiang cerucuk putaran itu. Baj cerucuk itu berlabuh berdekatan timbunan cerucuk-cerucuk putaran itu. Tiada bendera atau tanda amaran lain diletakkan di cerucuk-curucuk itu. IT itu telah belayar di sungai itu dengan menarik ET. Pengemudi IT tidak menghiraukan arahan pemandu bendera plaintif untuk berhenti dan mengasak masuk melalui aliran sungai yang sempit itu. Ini telah

mengakibatkan pelanggaran kejadian pertama — ET berlanggar dengan baj plaintif Melana 23. Plaintif telah menyiapkan kerja memantakkan cerucuk-cerucuk putaran untuk tembok di kedua-dua belah tebing sungai itu. Cerucuk rig dan bot tarik itu bagaimanapun masih di kawasan tersebut berlabuh di sungai itu. Awal pagi itu, IT sekali lagi telah belayar melalui sungai dengan menarik ET dan pelanggaran kejadian kedua berlaku — salah satu daripada kapal itu berlanggar dengan cerucuk-cerucuk yang telah disiapkan plaintif. Kejadian kedua ini membentuk substratum tindakan ini. Plaintif berhujah bahawa kejadian itu telah disebabkan oleh kecuaian defendan-defendan, khususnya di mana ET itu ditarik oleh IT dengan kelajuan tinggi dan tanpa menghiraukan tanda-tanda amaran. Ia adalah pengemudian tidak selamat oleh defendan-defendan yang tidak menghiraukan amaran dan tanda keselamatan. Pendek kata, adalah kes plaintif bahawa IT yang dikemudikan oleh defendan ketiga yang menarik ET telah belayar dengan kelajuan tinggi sepanjang laluan sungai ke arah hilir sungai pada lebih kurang jam 0700. Defendan ketiga tidak menghiraukan amaran pemandu bendera plaintif Sonny Ajang untuk berhenti atau mengurangkan kelajuan kapal-kapal itu. Berikutan itu ET telah berlanggar dan merosakkan tiga cerucuk-cerucuk putaran Tembok 3 jambatan itu. Sehubungan itu, plaintif telah bergantung kepada terjemahan kenyataan bertulis Sonny Ajang yang dibuat kepada penilai kerugian selepas kejadian itu. Plaintif selanjutnya menekankan bahawa versi ini patut diterima kerana penghakiman telah dibuat terhadap defendan ketiga yang telah memberikan versi kejadian bertentangan yang telah digunakan oleh defendan pertama.

Diputuskan, membenarkan sebahagian tuntutan:

(1) Walaupun defendan pertama telah berhujah bahawa tiada kewajipan berjaga-jaga, tiada kes autoriti yang kukuh telah dikemukakan oleh defendan pertama untuk menyokong cadangannya. Hujah defendan pertama adalah, sebagai pengguna biasa sungai itu untuk pengemudian, ia mempunyai kewajipan berjaga-jaga hanya kepada pengguna lain sungai itu sebagai laluan pengemudian. Defendan pertama bagaimanapun tidak mempunyai kewajipan kepada plaintif yang mengakibatkan halangan dan bahaya untuk laluan trafik sungai. Plaintif secara sah berada di kawasan sungai itu untuk menjalankan kerja pembinaan. Kerja memantakkan tiang cerucuk oleh plaintif boleh dianggap sebagai halangan kerana ia adalah perlu dan membentuk sebahagian dan seluruh kerja pembinaan. Pihak-pihak itu berkongsi menggunakan laluan air sungai itu. Lembaga Sungai Sarawak tidak membenarkan plaintif menutup sungai itu dan plaintif tidak boleh menghalang atau membahayakan laluan trafik sungai itu. Plaintif telah mengatur kedudukan boya pandu arah itu tetapi tidak dikehendaki meletakkan lampu, tanda atau amaran di cerucuk-cerucuk yang telah

siap menurut Peraturan-Peraturan (Trafik) Sungai Sarawak 1993 (lihat perenggan 32–33). A

(2) Kejadian dalam kes ini tiada beza dengan pelanggaran kenderaan motor dengan jambatan gantung yang menyokong struktur dalam pembinaan. Defendan-defendan pertama dan ketiga mempunyai kewajipan berjaga-jaga terhadap plaintif. Isu utama untuk ditentukan adalah sama ada terdapat pelanggaran kewajipan berjaga-jaga bahawa akibat itu cerucuk-cerucuk itu dikatakan telah rosak. Ini adalah fakta isu pada mulanya yang bergantung kepada keterangan sepertimana dikemukakan oleh pihak-pihak. Prinsip *ipsa loquitor* tidak boleh terpakai di sini kerana plaintif mengetahui dan mengemukakan keterangan berhubung kenapa dan bagaimana kejadian itu berlaku (lihat perenggan 34–35). B C

(3) Kes plaintif berdasarkan kenyataan bertulis Sonny Ajang adalah di mana IT yang menarik ET telah belayar dengan laju ke arah kawasan pembinaan plaintif. Defendan ketiga, *skipper* dan pilot IT tidak menghiraukan tanda amaran pemandu benderan plaintif untuk berhenti atau memperlahankan kapal-kapal dan akibat itu ET telah melanggar cerucuk-cerucuk itu. Versi fakta ini adalah bertentangan secara langsung dengan versi defendan pertama berdasarkan kenyataan bertulis defendan ketiga bahawa IT yang menarik ET telah belayar dengan perlahan melawan arus sungai yang cetek kerana pilot amat menyedari tentang kewujudan kawasan pembinaan plaintif. Pada masa matan kejadian, defendan ketiga telah mematikan enjin IT apabila melihat bendera merah yang terletak di baj rig cerucuk itu bagi mengelakkan daripada melanggar baj dan cerucuk-cerucuk putaran yang dibina itu. Satu-satunya fakta umum adalah bahawa pelanggaran ke atas cerucuk-cerucuk plaintif yang telah siap itu telah berlaku. Versi sebenar kejadian itu hanya dalam pengetahuan peribadi Sonny Ajang dan defendan ketiga. Tiada antara mereka dipanggil sebagai saksi untuk memberi keterangan di mahkamah dan diperiksa balas tentang kejadian itu. Pihak-pihak itu hanya bergantung pada kenyataan luar mahkamah masing-masing dibuat selepas kejadian itu dan keterangan saksi-saksi lain yang mempunyai pengetahuan dengar cakap menerusi salah seorang daripada mereka (lihat perenggan 36–38). D E F G H

(4) Tiada penemuan kesalahan atau saman dikeluarkan oleh Lembaga Sungai Sarawak tentang kejadian itu yang dapat membantu untuk menentukan kebersalahan dalam kejadian itu. Walau bagaimanapun, penemuan atau saman Lembaga Sungai Sarawak tidak kritikal atau perlu untuk plaintif membuktikan kesnya. Defendan ketiga telah melanggar kewajipan berjaga-jaganya apabila dia dengan pengetahuan membawa kapal-kapal itu terlalu dekat dengan cerucuk-cerucuk itu. Kerosakan akibat daripada pelanggaran itu adalah pelanggaran yang merosakkan cerucuk-cerucuk yang telah disiapkan oleh plaintif. Dalam kata lain, I

defendan ketiga telah melakukan kecuaian. Defendan pertama sebagai majikan defendan ketiga bertanggungjawab secara vikarius kerana pelanggaran kewajipan tort yang dilakukan oleh pekerja di bawah kontrak perkhidmatan dalam menjalankan pekerjaan (lihat perenggan 41, 44–45).

(5) Defendan pertama telah cuai kerana tidak memastikan kapal-kapal itu tidak belayar terlalu dekat dengan cerucuk-cerucuk itu. Defendan kedua yang tidak mempunyai hubungan langsung yang sah dengan defendan pertama, isu kebersalahan adalah persoalan undang-undang. Kerosakan yang diakibatkan tidak mungkin dapat dijangkakan dengan munasabah oleh defendan kedua. Selain itu, tiada kehampiran langsung antara plaintif dan defendan kedua. Ia juga tidak adil dan tidak munasabah untuk mengenakan liabiliti ke atas defendan kedua oleh kerana ia tiada kawalan dan pengurusan kapal-kapal itu pada masa tanpa pelanggaran. Oleh itu tiada kewajipan berjaga-jaga oleh defendan kedua terhadap plaintif di sini. Sewajarnya hujah plaintif bahawa ET dan IT membentuk 'one boat' atau 'one vehicle' menjadikan defendan kedua pelaku tort bersama dengan defendan pertama telah disalah tanggap (lihat perenggan 47 & 50).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1248–1334.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Blyth v Birmingham Waterworks Co [1843–60] All ER Rep 478 (folld)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Jaafar bin Mohd Khalid v Hong Leong Bank Bhd [2013] 5 MLJ 800; [2013] 8 CLJ 869, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (folld)

Kayla Beverly Hills (M) Sdn Bhd Anor v Quantum Far East Ltd v Ors; (Uma Devi d/o R Balakrishnan, third party) [2003] 6 MLJ 703, HC (folld)

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124, SC (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l

Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors [2014] 8 MLJ 625, HC (refd)
Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244 (refd)
Owners of Other Persons Interested in the Ship or Vessel The 'Red Gold', The v Sarawak Shell Bhd & anor Appeal [2012] 4 MLJ 729; [2012] 8 CLJ 164, CA (refd)
Owners of the Ship MV Hong Leong, The v The Owners of the Ship MT Man Hua No 3 & Anor [1994] 3 MLJ 800; [1994] 4 CLJ 910, HC (folld)
Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara Selatan [1997] 5 MLJ 488; [1997] 4 CLJ 54, HC (distd)
Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360; [2013] 6 CLJ 958, CA (refd)
Pua Lai Ong v Kassim bin Yunus & Anor [1993] MLJU 240; [1993] 2 AMR 3208, HC (refd)
Renugavathi Chiratamby v Belati Wangsa (M) Sdn Bhd [2010] 6 CLJ 820, HC (distd)
Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel The 'Borcos Takdir' [2012] 5 MLJ 515; [2012] 1 LNS 1116, HC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Evidence Act 1950 ss 2, 32, 33, 32(1)(b), 58, 73A, 101
Merchant Shipping Ordinance 1960 [UK]
Rules of Court 2012
Sarawak Rivers (Traffic) Regulations 1993

JB Reuben Netto (Netto & Co) for the plaintiff.
R Thayalan (R Thayalan) for the first defendant.
Thomas Lai (Thomas Lai & Wallace Wong) for the second defendant.
Ng Yew Huoi (Yew Huoi & Assoc) for the third party.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a tort of negligence action arising from a vessel collision incident onto constructed bridge pier spun piles for a river bridge crossing.

[2] The plaintiff is the contractor who was awarded the construction contract by the Public Works Department of Sarawak to build the proposed road between Sibu and Sungei Loba Satubah in Sarawak ('the project').

[3] The first defendant is the registered owner of the tugboat named as the Inai Teratai 86 ('IT').

[4] The second defendant is the registered owner of the barge named as Eng Tou 110 ('ET').

[5] The third defendant is at the material time an employee of the first defendant and the captain piloting the IT.

[6] The third party chartered the ET from the second defendant via a rental agreement dated 21 July 2008 at the material time. By a letter dated 25 February 2009, the first defendant sub-chartered the ET from the third party.

[7] The claim in this action is a subrogated claim of RM1,173,059.41 made in the name of the plaintiff by Overseas Assurance Corp Malaysia Bhd ('OAC') for recovery after payout to the plaintiff under the contractor all risk insurance policy No ECR-E0007647.

THE TRIAL PROCESS

[8] Judgment in default was obtained against the third defendant before the trial of the action.

[9] The trial lasted one and a half days on 17–18 March 2014. The trial documents were marked as Bundles A to J. The documentary evidence adduced are compiled in trial Bundles C, D, E and F and exhs P1, P2 , P3, P4, D1, D2 and T1. Following *Kayla Beverly Hills (M) Sdn Bhd Anor v Quantum Far East Ltd v Ors; (Uma Devi d/o R Balakrishnan, third party)* [2003] 6 MLJ 703, the third party was permitted to participate in the main trial to further argue on behalf of the second defendant.

[10] The following witnesses were called by the respective parties:

(a) Ting Lai Kien ('PW1') who is a manager of the claim management department of OAC;

(b) Tan Kar Tech ('PW2') who is a construction manager in the plaintiff company and was the deputy project manager of the project;

(c) Marie Joanna Buma ('PW3') who is a project manager in the plaintiff company and was also the project manager of the project;

(d) Vincent Foo Chee Hui ('PW4') who is a senior manager in Mclaren Saksama (M) Bhd, the loss adjustors for OAC who assessed the insurance claim of the plaintiff;

(e) Ganeswaran a/l Nachiappan ('DW1') who is a project manager of the first defendant and was the QA/QC engineer of the first defendant at a worksite near the project;

(f) Hii Sing Koh ('DW2') who is a director of the second defendant; and

(g) Tan Lik Ping ('TW1') who is a director of the third party.

[11] After trial, the parties concurrently submitted their respective written closing submissions in chief followed by their respective written submissions in reply.

[12] The oral clarification on the submissions by counsel were made on 16 May 2014 and 12 June 2014 and the court requested for further written submissions be made by the first defendant and the plaintiff.

BACKGROUND FACTS

[13] The project involved the construction of the river bridge crossing at Sungei Loba Satubah. The bridge is supported by piers on both sides of the river bank. The foundation for the piers comprised of driven pre-stressed concrete spun piles. The piles were driven by a piling rig placed on a barge towed by a tug boat.

[14] The villagers living upstream commute using the river daily. The first defendant also used the river to transport its material and equipment for its construction project in the upstream vicinity. The first defendant was aware of the plaintiff's construction site and activities by letter dated 8 September 2008 and sought permission from the plaintiff to sail its dredger through the site. The plaintiff by letter dated 10 September 2008 permitted the first defendant to do so subject to certain safety and precautionary measures be taken.

[15] The Sarawak River Board did not allow the river to be closed to traffic in the course of construction of the bridge and the plaintiff was required to deploy navigational buoys, stationery warning flags and flagmen. In this respect, navigational buoys were placed at distances of 500 metres and a red flag was fixed on the piling rig barge used for piling of the spun piles. The piling barge was berthed near the piled spun piles. There were no flags or other warning signs placed on the piles.

[16] On 24 November 2008, the IT sailed on the river towing the ET. The pilot of the IT ignored the plaintiff's flagman's instruction to stop and squeezed through the narrow river channel. This resulted in the first incident of collision — the ET collided onto the plaintiff's barge Melana 23.

[17] The plaintiff had by 27 November 2008 completed piling the spun piles for the piers on both sides of the river bank. The piling rig barge and tugboat were nevertheless still at the site berthed on the river. Early that morning, the IT again sailed on the river towing the ET and the second incident of collision occurred — one of the vessels collided onto the plaintiff's completed piles.

THE PLAINTIFF'S CONTENTIONS

[18] This second incident formed the sub stratum of this action. The plaintiff contends that the incident was caused by the defendants' negligence as pleaded in para (5) of the statement of claim, inter alia, particularly that the ET was towed by the IT at an excessive speed and without heeding the warning signs. It was unsafe navigation by the defendants in ignorance of safety warnings and signals.

[19] In crux, it is the plaintiff's case that the IT piloted by the third defendant that was towing ET sailed at an alarming speed along the river waterway in the upstream direction at around 0700 hours. The third defendant did not heed the signal of the plaintiff's flagman Sonny Ajang (also the skipper of the tugboat that towed the piling rig barge) to stop or slow down the vessels.

[20] Consequently the ET collided and damaged three spun piles of pier 3 of the bridge. In this regard, the plaintiff primarily relied on the translated written statement of Sonny Ajang made to the loss adjustor after the incident.

[21] This version of the incident is supported by the testimony of PW2 who heard from Sonny Ajang besides PW2's own observation shortly after the collision that the ET was being maneuvered out of the damaged piles. A police report dated 28 November 2008 was also made by PW2. The plaintiff further emphasised that this version must be accepted since judgment has been entered against Captain Zainal bin Ismail, the third defendant who proffered a conflicting version of the incident that is relied upon by the first defendant.

[22] PW1 thereafter on behalf of the plaintiff wrote to the first defendant on 1 December 2008 to hold the first defendant liable for the plaintiff's losses. There was no contemporaneous response from the first defendant.

THE FIRST DEFENDANT'S CONTENTIONS

[23] The crux of the first defendant's defence is three pronged. Firstly, it is argued that the plaintiff failed to prove the occurrence of the collision. Secondly, even if the collision occurred, there was no duty of care owed to the plaintiff. Thirdly, if there was a duty of care owed, the collision was not attributed to the negligence of the first defendant.

[24] According to the first defendant's version, the third defendant whilst piloting IT with ET towed sailed slowly on receding river current since he was aware of the existence of the plaintiff's construction site. At the material time of the incident, the third defendant stopped the engine of IT upon seeing the red flag of the piling rig barge to avoid colliding with the barge and the constructed piles. Unfortunately the ET drifted and touched the piles.

[25] In this respect, the first defendant relied on the written statement of the third defendant dated 28 November 2008 that was subsequently submitted to the Public Works Department of Sarawak by letter dated 21 March 2009.

THE SECOND DEFENDANT'S CONTENTIONS

[26] As far as the second defendant is concerned, the second defendant was not involved in the incident because the ET had been chartered to the third party.

[27] Besides, the ET could not be self propelled and was at the material time of the incident towed by IT which did not belong to the second defendant. The IT was piloted by the third defendant who was not employed by the second defendant.

THE THIRD PARTY'S CONTENTIONS

[28] The third party supported the second defendant's contention that the second defendant was not liable to the plaintiff in negligence. Besides the third party contended that it was not bound to indemnify or contribute to the second defendant by reason of the nature of the relationship of the parties. In addition the third party did not manage and control the ET at the material time of the collision. In any event, the third party's liability if any is limited by virtue of s 11Merchant Shipping (Implementation of Conventions relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 .

FINDINGS OF THE COURT

[29] The law on negligence in Malaysia is succinctly summarised by the court of appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585, wherein Gopal Sri Ram JCA (as he then was) said: 'First, he must show he owed a duty of care by the defendant to take reasonable care. Second that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote'.

[30] As to duty of care, the Court of Appeal in *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360; [2013] 6 CLJ 958 and *Jaafar bin Mohd Khalid v Hong Leong Bank Bhd* [2013] 5 MLJ 800; [2013] 8 CLJ 869 applied the test as enunciated by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, to wit:

(a) whether the damage is reasonably foreseeable;

(b) whether there is a relationship of proximity between the claimant plaintiff and the defendant; and

(c) whether it is just, fair and reasonable to impose a duty in such a situation.

[31] Be that as it may, it is clear by s 101 of the Evidence Act 1950, the plaintiff bears the burden of proof on a balance of probabilities to establish all the elements of the tort.

[32] Although the first defendant has contended that no duty of care is owed, no cogent case authority was produced by the first defendant to support its proposition. The argument of the first defendant is that as an ordinary user of the river for navigation, it owed a duty of care only to other users of the river as navigational channel. The first defendant does not however owe the duty to the plaintiff who caused obstruction and danger to the riverine traffic.

[33] I observed that in *The Owners of the Ship MV Hong Leong v The Owners of the Ship MT Man Hua No 3 & Anor* [1994] 3 MLJ 800; [1994] 4 CLJ 910, the court held that the defendant clearly owed a duty of care to avoid collision with the plaintiff's ship. The existence of the duty of care is nevertheless to some extent circumstantial depending on the facts. I am unable to accept that the first defendant did not owe any duty of care to the plaintiff. The plaintiff was lawfully present at the river site to undertake construction works. The completed piling work of the plaintiff cannot in my view be considered an obstruction because it was necessitated and formed part and parcel of the construction works. The parties were sharing usage of the river waterway. The Sarawak River Board did not permit the plaintiff to close the river and the plaintiff must not obstruct or endanger riverine traffic. The plaintiff had deployed navigational buoys but was not required to place lights, signs or warnings on the completed piles pursuant to the Sarawak Rivers (Traffic) Regulations 1993. The facts in the cases of *Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara Selatan* [1997] 5 MLJ 488; [1997] 4 CLJ 54 and *Renugavathi Chiratamby v Belati Wangsa (M) Sdn Bhd* [2010] 6 CLJ 820 relied by the first defendant are distinguishable in that the defendants therein plainly committed misfeasance for lack of maintenance.

[34] I find that the incident in this case is no different from a road motor vehicle collision onto an overhead bridge support structure under construction. It is seen in *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 that the court found the defendants liable in negligence caused to the plaintiff's real property as the result of motor collision between the defendants' vehicles. Based on the *Caparo Industries* test, the required elements are in my view plainly satisfied. I therefore hold that the first and third defendants owed the duty of care to the plaintiff as pleaded and particularised in para (5) of the statement of claim. The position of the second defendant is discussed in para (50) below.

[35] The principal issue for determination is whether there was breach of that duty of care that in consequence damaged the piles as alleged. This is essentially a factual issue which is much dependent on the evidence as adduced by the parties. The principle of *res ipsa loquitor* is inapplicable here because the plaintiff knew and adduced evidence as to why and how the incident occurred.

[36] The plaintiff's case based on Sonny Ajang's written statement is simply the IT that was towing ET sailed very fast towards the plaintiff's construction site. The third defendant, the skipper and pilot of the IT did not heed the signal of the plaintiff's flagman to stop or slow down the vessels and that resulted in the ET colliding onto the piles.

[37] This factual version is in direct conflict with the first defendant's version based on the third defendant's written statement that the IT towed the ET sailed slowly against receding river current because the pilot was well aware of the existence of the plaintiff's construction site. At the material time of the incident, the third defendant stopped the engine of the IT upon seeing the red flag placed on the piling rig barge to avoid colliding with the barge and the constructed spun piles. The only common fact was that the collision onto the plaintiff's completed piles nonetheless happened.

[38] The true account of the incident is only within the personal knowledge of Sonny Ajang and the third defendant. Neither of them was called as a witness to testify in court and be cross-examined on the incident. The parties only relied on their respective out of court statement made after the incident and the testimony of other witnesses who have second hand hearsay knowledge from either of them.

[39] The defendants and third party contend that as a matter of law, the hearsay evidence on the incident is inadmissible following the supreme court case of *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 and Court of Appeal case of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors*

[2009] 4 MLJ 610. In civil proceedings, oral and documentary hearsay evidence is only admissible if they fall within s 32 to s 33 and s 73A of the Evidence Act 1950 respectively. This is in direct contrast with arbitration proceedings where both documentary and oral hearsay evidence are normally admissible but left to the arbitral tribunal to accord the appropriate weight because the Evidence Act 1950 is not applicable to proceedings before the arbitrator, see s 2 of the Evidence Act 1950. The hearsay evidence in issue here formed part of the oral testimony of PW2 and PW3 as well as the written statements of Sonny Ajang and the third defendant. As to the hearsay oral testimony of PW2 and PW3 on the incident as briefed to them by Sonny Ajang, I find that this oral testimony is nonetheless admissible pursuant to s 32(1)(b) of the Evidence Act 1950 because Sonny Ajang cannot be found as testified by PW4 and Sonny Ajang orally related the incident to PW2 and PW3 in the ordinary course of this project business. The documentary hearsay evidence on the incident is found in Sonny Ajang's written statement given to the loss adjustor and the third defendant's written statement submitted to the Public Works Department of Sarawak, both of which were admissible and given in evidence pursuant to s 58 of the Evidence Act 1950 notwithstanding that they were not called as witnesses. The parties have in this respect consented to the admissibility of both written statements and categorised them in part B where the authenticity but not the truth of the contents of document is admitted following the federal court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 before the commencement of the trial.

[40] Besides this conflicting account on the manner the IT was piloted, it was pointed out by the defendants and third party that the plaintiff's witnesses also gave conflicting testimony on two circumstances surrounding the incident. One inconsistency is on the width of the river whereby PW2, PW3 and PW4 gave three different estimation of the river width: PW2 stated it to be 40–50 metres, PW3 stated 300 metres and PW4 stated between 500–600 metres. The other inconsistency pertains to the vessel that collided with the piles: PW2 stated that it was ET whilst PW3 stated it was IT instead. I do not find the conflicts here to be fatal to the plaintiff's case in any way. In regard to the river width, though I am unable to conclude on the exact width of Sungei Loba Satubah at the location of the incident, I am nevertheless satisfied that the river was narrow. It wasn't easy maneuvering vessels without necessary precautions observed. As to the vessel that collided with the piles, I find and hold that it was the ET as clearly testified by PW2 based on his direct observation of the ET maneuvering away from the piles after collision and as pleaded in para (5) of the statement of claim. PW3 was merely mistaken.

[41] I also note that there was no finding of fault or summons issued by the Sarawak River Board on the incident which would be helpful to ascertain

culpability for the incident. However, it is my view that the finding or summon of the Sarawak River Board is neither critical nor necessary for the plaintiff to prove its case.

[42] Although the standard required of the plaintiff in the discharge of its burden of proof is on a balance of probabilities, I am mindful that Denning J (as he then was) in *Miller v Minister of Pensions* [1947] 2 All ER 372 said: 'If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not'.

[43] Notwithstanding that the factual account of the collision by Sonny Ajang and the third defendant are in conflict on details of the incident, they do not however in my view separately proffer a different causal reason for the collision: for example a conflict as to whether it was the plaintiff's or the defendant's barge that collided onto the piles. In such a situation, the causation of the collision cannot be resolved to warrant a finding in favour of the plaintiff: see for example on the facts in *The Owners of Other Persons Interested in the Ship or Vessel The 'Red Gold' v Sarawak Shell Bhd & anor Appeal* [2012] 4 MLJ 729; [2012] 8 CLJ 164 and *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel The 'Borcos Takdir'* [2012] 5 MLJ 515; [2012] 1 LNS 1116. Basically the conflict here between them can be discerned and reduced to failure of the third defendant to heed the flagman's warning as well as on the speed of the vessels piloted by the third defendant at the material time of collision — whether it was too fast or otherwise. The inability of the plaintiff to prove both these aspects affirmatively does not in my view conclusively suggest the plaintiff has failed to prove breach of the duty of care on the part of the defendants.

[44] From the appraisal of all the evidence adduced in totality following the Court of Appeal case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324, I find and hold that the third defendant had steered and sailed the IT and ET *too close* to the piles in breach of his duty to avoid a dangerous situation from occurring as pleaded in para 5(f) of the statement of claim. This is to my mind the irresistible fact and dominant operative cause; otherwise the collision by the ET onto the piles could not have occurred. PW2's direct observation of the ET having to be maneuvered away from the collided piles corroborated this fact. The speed of the vessels would have more likely contributed to the extent of the damage to the piles. I have also taken into consideration that the first and third defendants were fully aware and acquainted with the river navigational conditions and constraints from its earlier correspondences with the plaintiff and the first incident of collision at the same place just three days before this incident. Notwithstanding that there were navigational buoys placed by the plaintiff, the first and third defendants were not in other words sailing the vessels here for the

first time when this incident occurred. The existence of the piles was therefore foreseen and it is unacceptable for the vessels to have sailed so proximate to the completed piles.

[45] Accordingly, I find and hold that the third defendant breached his duty of care when he knowingly sailed the vessels too close to the piles. The damage consequential to the breach is the collision that damaged the plaintiff's completed piles. In other words, I find the third defendant negligent. In so finding, I am guided by the following words of Alderson B in *Blyth v Birmingham Waterworks Co* [1843–60] All ER Rep 478: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done'. Judgment in default has been entered by the plaintiff against the third defendant and there is no application made whatsoever to set aside the judgment.

[46] It is trite law that the first defendant as the employer of the third defendant is vicariously liable for the breach of tortiuous duty committed by its employee under a contract of service in the course of employment, see *Pua Lai Ong v Kassim bin Yunus & Anor* [1993] MLJU 240; [1993] 2 AMR 3208 and *N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan) v Datuk Seri Khalid bin Abu Bakar & Ors* [2014] 8 MLJ 625.

[47] Furthermore or alternatively, I find that the first defendant was negligent for not ensuring that the vessels did not sail too closely to the piles.

[48] In the circumstances, I therefore find and hold the first defendant negligent and liable to the plaintiff.

[49] As for the second defendant who has no direct legal relationship with the first defendant, the issue of culpability is a question of law. The relevant case is that of *The Owners of the Ship MV Hong Leong v The Owners of the Ship MT Man Hua No 3 & Anor* [1994] 3 MLJ 800; [1994] 4 CLJ 910 where both the second defendant and third party rely to rebut the 'one ship rule'. The facts in that case are very similar to the facts herein. In that case, the dumb barge which was unmanned and had no engine was towed by a tugboat which was under the control and management of the tugboat's agent or servant and the dumb barge hit the plaintiff's ship which was at anchor. At that material time the dumb barge was chartered to the first defendant therein. Abdul Kadir bin Sulaiman J (as he then was) held that:

[1] The tugboat, in managing its affairs under the circumstances at the material

time, and having the barge Bosta Jaya in its control, clearly owed a duty of care to avoid the collision between its tow and the plaintiff's ship and ...;

[2] The second defendant, the owners of the barge, is not liable for this collision. From the facts disclosed it was clear that at the material time the barge was out of the control of the second defendant. The barge was then under the control and management of the servants of the first defendant. That being the case, the first defendant must be the only party responsible ... The one ship rule does not apply in this case and hence the second defendant, under the circumstances, cannot be made liable for the act of the first defendant or its agents or servants.

[50] I do not see any cogent reason here not to follow the decision and reasoning of Abdul Kadir bin Sulaiman J. The ET is clearly also a dumb barge towed by the IT under the control and management of the third defendant, the employee or servant of the first defendant. Based on the *Caparo Industries* test in the circumstances, I am of the opinion that the resultant damage was not reasonably foreseeable by the second defendant. Besides, there is the absence of direct proximity between the plaintiff and the second defendant. It would also be unjust and unreasonable to impose liability on the second defendant since it has no control and management of the vessels at the material time of the collision. There is therefore no duty of care owed by the second defendant to the plaintiff here. Accordingly the plaintiff's submission that the ET and IT constituted a 'one boat' or 'one vehicle' making the second defendant a joint tortfeasor with the first defendant is misconceived.

[51] In the premises and notwithstanding that the first and third defendants are liable as found, I find and hold that the second defendant is not liable to the plaintiff.

[52] It therefore follows that the third party is not liable to the second defendant since there is no necessity here to indemnify or contribute to the second defendant. Accordingly it is also unnecessary to determine the defences raised by the third party.

CONCLUSION

[53] I observe that the sum of RM1,173,059.41 claimed by the plaintiff based on the loss adjustment of PW4 has not been seriously challenged at the trial.

[54] Based on my above findings, I therefore enter judgment in the sum of RM1,173,059.41 for the plaintiff against the first defendant with interest at 5%pa on the judgment sum from 27 January 2010 until full realisation based on s 11 of the Civil Law Act 1956 and Rules of Court 2012. The first defendant shall pay this judgment sum with interest to OAC in subrogation. The

plaintiff's claim against the second defendant is dismissed and the second defendant's claim against the third party is also dismissed.

[55] As to costs, I order that the first defendant pays OAC in subrogation the sum of RM30,000. I further order that OAC in subrogation pays the second defendant the sum of RM30,000. I also order that the second defendant pays the third party costs in the sum of RM30,000.

Claim allowed in part.

Reported by Afiq Mohamad Noor